

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
Amendment of Parts 73 and 76 of the	)	
Commission's Rules Relating to Program	)	GEN. Docket No. 87-24
Exclusivity in the Cable and Broadcast	)	
Industries	)	

To: The Commission

**SUPPLEMENTAL COMMENTS OF BLOCK COMMUNICATIONS, INC.**

In 1988, the Commission adopted, but never acted on, a *Further Notice of Proposed Rulemaking* in this docket (the "*Further Notice*"),<sup>1</sup> which intended, among other things, to harmonize its syndicated exclusivity ("Syndex") and network non-duplication ("Non-Duplication") rules. The Commission proposed applying its Syndex "Grade B" safeguard to both network and non-network programming, which would provide consumers with the same protection from losing cable television access to broadcast network programming they can receive over the air as they enjoy for non-network programming. In the intervening twenty-two years since adoption of the *Further Notice*, dramatic changes in the law and the television market have made enactment of the Commission's proposal imperative to protect the public interest. Therefore, Block Communications, Inc. ("Block"), pursuant to section 1.1206(a) of the Commission's rules, hereby submits these supplemental comments regarding the *Further Notice* and urges the Commission to adopt its proposal now.

Block is uniquely suited to provide the Commission with balanced information regarding these matters because it owns not only two cable television systems serving portions of the Cleveland, Ohio; Toledo, Ohio; and Detroit, Michigan Designated Market Areas ("DMAs"), but

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<sup>1</sup> Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, *Further Notice of Proposed Rulemaking*, 3 FCC Rcd 6171 (1988) ("*Further Notice*").

also nine television broadcast stations serving the Louisville, Kentucky; Champaign, Illinois; Boise, Idaho; and Lima, Ohio DMAs.

Since adoption of the *Further Notice*, Congress enacted both the 1992 Cable Act<sup>2</sup> and the 1996 Telecommunications Act.<sup>3</sup> During this period, the Commission also instituted both mandatory carriage and retransmission consent requirements for cable operators and broadcasters<sup>4</sup> and transitioned broadcasting from analog to digital transmissions.<sup>5</sup> Meanwhile, new technologies and the market created broadband Internet, Direct Broadcast Satellite television, telephone company video delivery, and voice-over-IP services, to name only a few. At the same time, the discrepancy between the Non-Duplication and Syndex rules has become a potentially anti-competitive weapon that is harming consumers. Now is the time to implement the Commission's common-sense proposal of harmonizing its Syndex and Non-Duplication rules by applying the "Grade B" signal contour safeguard to both network and non-network programming.<sup>6</sup> This will ensure that cable television customers will not be unfairly deprived of either network or non-network programming they otherwise can receive over the air. Absent action by the Commission, cable television viewers will continue losing access to network programming signals that are viewable over the air in their communities contrary to the public interest and Commission policy.<sup>7</sup> Thanks to the Syndex signal coverage safeguard, consumers already are protected with regard to non-network programming, and the Commission should extend that same consumer protection to network programming as it intended to do in 1988.

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<sup>2</sup> The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

<sup>3</sup> The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>4</sup> See, e.g., 47 C.F.R. § 76.56; 47 C.F.R. § 76.64.

<sup>5</sup> See Digital Television and Public Safety Act of 2005 ("DTV Act") (Title III of the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) (*codified at* 47 U.S.C. §§ 309(j)(14) and 337(e))).

<sup>6</sup> See 47 C.F.R. § 76.156(a); compare 47 C.F.R. § 76.92(f).

<sup>7</sup> See Time Warner Cable Inc., *et al.*, *Petition for Rulemaking*, MB Docket 10-71 (filed Mar. 9, 2010); Buckeye Cablevision, Inc., *Application for Review*, CSR-7853-N (filed Apr. 19, 2010) (re *WUPW Broadcasting, LLC*, 25 FCC Rcd 2678 (Med. Bur. 2010)) ("*WUPW Application for Review*"); Buckeye Cablevision, Inc., *Application for Review*, CSR-7024-N (filed Apr. 19, 2010) (re *WTVG, Inc.*, 25 FCC Rcd 2665 (Med. Bur. 2010)) ("*WTVG Application for Review*").

## I. BACKGROUND

In 1988, the Commission adopted the *Further Notice* primarily to address the effect of program exclusivity on “the efficient functioning of the program supply market” for broadcast programming and “the need for program exclusivity against other nearby broadcast stations, particularly those located on the fringes of their service areas.”<sup>8</sup> In considering the secondary effect of its Non-Duplication and Syndex rules on cable television viewers, the Commission stated its belief “that it is appropriate . . . to develop a consistent policy across all of these rules.”<sup>9</sup> The Commission specifically observed that “both of these rules prohibit stations from exercising exclusivity rights against other signals that are significantly viewed in the relevant cable community . . . [but that the] new syndicated exclusivity rules [also] ban exclusivity against other stations placing a Grade B signal over the cable community.”<sup>10</sup> The Commission concluded that the “program exclusivity rules should [not] differentiate between program types and distribution technologies” and it therefore “propose[d] to modify each of these rules.”<sup>11</sup> In other words, the Commission proposed incorporating the Syndex Grade B safeguard into the Non-Duplication rules.<sup>12</sup> This consistent approach would support the Commission’s long-standing Non-Duplication policy of “reproduc[ing] in cable households the same ability to view network programming that noncable subscribers in the same locality have.”<sup>13</sup> To date, however, the Commission has yet to act on its proposal, and the *Further Notice* remains pending.

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<sup>8</sup> *Further Notice*, 3 FCC Rcd at 6174, para. 25.

<sup>9</sup> *Id.* at 6177, para. 41.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Only analog broadcast stations have “Grade B” contours. Since the transition from analog to digital broadcasting, therefore, the Commission has used a station’s Noise Limited Service Contour (“NLSC”) to measure predicted coverage in the program exclusivity context. *See KXAN, Inc.*, 25 FCC Rcd 3307 (Med. Bur. 2010) (“we believe that it is appropriate for us to use the NLSC . . . in place of the Grade B contour for purposes of our analysis and application of the cable network nonduplication and syndicated program exclusivity rules here”). The Commission also uses the NLSC in place of the Grade B contour in the market modification context. *See, e.g., CoxCom, Inc. d/b/a Cox Communications Orange County*, 19 FCC Rcd 4509 at para. 9, n.27 (2004) (considering digital contour in market modification and noting that the “41 dBu signal strength contour of a digital television station generally approximates the Grade B contour of the corresponding analog station”).

<sup>13</sup> *Teleprompter of Quincy*, 83 FCC 2d 431 at para. 14 (1980) (citing *Memorandum Opinion and Order in Docket No. 19995*, 67 FCC 2d 1303, 1305 (1978); *American Television and*

(continued . . .)

## II. DISCUSSION

### A. The Commission Should Implement Its Proposal To Include A Signal Coverage Safeguard In The Non-Duplication Rules.

The Commission should implement its long-delayed proposal to apply the existing Syndex signal coverage safeguard to the Non-Duplication rules because the unintended discrepancy between these two substantively identical rules has led to unwarranted consumer disruption and increased costs.

By allowing network broadcasters to eliminate from cable television systems network programming from stations otherwise viewable over the air, this anomaly has led to consumers losing access to network broadcasters historically provided to them that they reasonably expect to be carried on their cable systems. At the same time, the resulting market power wielded by the remaining network broadcaster has driven up consumers' cost of cable television service. Both results are contrary to the statutory and regulatory policies underlying not only the broadcast exclusivity rules — *i.e.*, preserving for cable viewers uninterrupted access to stations they can view over the air<sup>14</sup> — but also the general broadcast carriage rules; namely “(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.”<sup>15</sup>

Adopting the Commission's proposal now would simultaneously promote these policies and protect consumers by ensuring that cable customers could not be unfairly deprived of network programming viewable over the air in their communities.

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(. . . continued)

*Communications Corp. (Oscoda, Michigan)*, 47 FCC 2d 211 (1974); *Cable Television Report and Order*, 36 FCC 2d 143, 181 (1972); *First Report and Order in Docket Nos. 14895 and 15233*, 38 FCC 683, 720, 4 Rad. Reg. 2d (P&F) 1725 (1965)).

<sup>14</sup> See, e.g., *Cable Television Report and Order*, 36 FCC 2d at 181 (denying exclusivity where “signals are generally available even without cable”).

<sup>15</sup> *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994) (“*Turner I*”).

**1. The Commission's Exclusivity Rules Are Designed To Preserve Cable Carriage Of Stations Available Over The Air.**

The Commission adopted the Non-Duplication rules as part of its original cable television regulations in 1965.<sup>16</sup> The rules were designed both to ensure cable carriage of broadcasters viewable over-the air in the community and to protect local broadcasters from unfair competition caused by the cable importation of distant broadcast signals.<sup>17</sup> The Commission subsequently clarified that cable operators would not be required to delete network programming carried on stations that were "significantly viewed" over-the-air in the relevant area, and, using significant viewing as an indicia of signal coverage, adopted the safeguard now contained in Section 76.92(f) of the rules.<sup>18</sup> The Non-Duplication rules, however:

were never intended to confer on any particular station an artificial competitive advantage over any other station in terms of access to cable television subscribers. On the contrary, these rules were designed to reproduce in cable households the same ability to view network programming that noncable subscribers in the same locality have, and thereby avoid imposing on local stations a competitive disadvantage of distant network stations not otherwise viewable locally. . . . The adoption of Section 76.92[(f)] was intended to cure the anomaly otherwise arising where both stations involved, the one claiming priority and the one whose programming is being deleted, are 'local' stations. They generally are competitors over-the-air, and we consider them both so local in nature that our rules mandate their carriage on the cable system.<sup>19</sup>

When the Commission reinstituted its Syndex rules in the first *Report and Order* in this docket, it similarly held that broadcasters had "no reasonable expectation of exclusivity" against other stations in any community where the stations could be viewed over the air.<sup>20</sup> The

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<sup>16</sup> See *First Report and Order in Docket Nos. 14895 and 15233*, 38 FCC at 720. The Commission's stated purpose "was and is to preserve the existing off-the-air situation, insofar as exclusivity is concerned, and not to give stations any greater exclusivity *vis-a-vis* CATV systems than they now enjoy as against each other." *Id.*

<sup>17</sup> *Id.* at 705-06, para. 57.

<sup>18</sup> *Memorandum Opinion and Order in Docket No. 19995*, 67 FCC 2d 1303.

<sup>19</sup> *Teleprompter of Quincy*, 83 FCC 2d 431 at para. 14 (1980) (emphasis added) (internal quotes omitted) (quoting *Memorandum Opinion and Order in Docket No. 19995*, 67 FCC 2d at 1305) (citing *American Television and Communications Corp. (Oscoda, Michigan)*, 47 FCC 2d 211; *Cable Television Report and Order*, 36 FCC 2d at 181; *First Report and Order in Docket Nos. 14895 and 15233*, 38 FCC at 720).

<sup>20</sup> Program Exclusivity in the Cable and Broadcast Industries, *Report and Order*, 3 FCC Rcd 5299, 5315 (1988) ("*Exclusivity Order*").

Commission, therefore, explicitly authorized cable operators to carry without interruption the signals of stations whose Grade B contour covered the cable system, syndicated exclusivity agreements notwithstanding.<sup>21</sup> The foregoing confirms that both the Syndex and Non-Duplication rules were designed to limit the scope of exclusivity agreements to the cable importation of distant broadcast signals that *could not otherwise be viewed over the air* in the relevant community.

As discussed above, although the Commission determined that “network non-duplication protection should conform as closely as possible” to its other exclusivity rules, in the *Exclusivity Order* it did not immediately rectify the discrepancy by implementing a corresponding Grade B safeguard in the Non-Duplication rules. Instead, the Commission chose to address the matter in the *Further Notice*,<sup>22</sup> and there proposed incorporating the Syndex signal coverage safeguard in the Non-Duplication rules.<sup>23</sup> In response, commenters specifically endorsed the Commission’s proposal.<sup>24</sup> As demonstrated herein, now is the time for the Commission to act on this simple but effective method of protecting the public interest and supporting the Commission’s policies.

## **2. A Signal Coverage Safeguard In The Non-Duplication Rules Will Protect Consumers From Anti-Competitive Practices.**

The unintended absence of a signal coverage safeguard in the Non-Duplication rules has harmed consumers. Consumers have been caught in the middle as waivers of the Non-Duplication rules have become a potentially anti-competitive weapon. Because the Non-Duplication rules (unlike the Syndex rules) currently have no signal coverage safeguard, some network-affiliated stations have used waivers of the significantly viewed safeguard to eliminate from cable systems network competitors that can be viewed over the air and leverage their resulting sole-provider status to the detriment of cable television consumers. This regulatory disparity distorts the market by enabling some network stations to demand exclusivity in situations where no exclusivity should be

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 5319.

<sup>23</sup> *Further Notice*, 3 FCC Rcd at 6177, para. 41.

<sup>24</sup> See Allen’s TV Cable Service, *et al.*, *Comments*, FCC Gen. Docket 87-24 (filed Jan. 17, 1989) at 7; National Cable Television Association, Inc., *Comments*, FCC Gen. Docket 87-24 (filed Jan. 17, 1989) at n. 13.



possible under the Commission's governing policies, and which in fact already is impossible with regard to non-network programming due to the Syndex signal coverage safeguard.

The detriment has fallen on cable television consumers who, despite the Commission's policies, have lost access to network programming long-carried on their cable systems that is viewable over the air in their communities. In addition to the absence of a signal coverage safeguard in the Non-Duplication rules, two additional recent factors have exacerbated the problem and militate toward adoption of the Commission's 1988 proposal now. First, changes in the economics of broadcast network affiliation relationships in recent years have led networks and their affiliates to seek increased retransmission consent fees from cable television operators and, ultimately, their customers.<sup>25</sup> Second, the Media Bureau's evolving relaxation in the burden of proof required of significantly viewed waiver petitioners has undermined the Commission's network non-duplication policies.<sup>26</sup> The Bureau over the years has — without direction from the Commission — relaxed its approach to granting waivers of the significantly viewed safeguard. The Commission, however, has the opportunity here to simply and easily restore the effectiveness of its policies while protecting consumers from unwarranted disruptions and anti-competitive gaming of the exclusivity rules. The Commission should seize that opportunity by adopting without further delay its 1988 proposal to also include a signal coverage safeguard in its Non-Duplication rules.

Using signal coverage to define the scope of a station's market and carriage rights is consistent with statutory and regulatory policies that have traditionally guided the Commission. For example, a station's signal contour is and has been a primary factor in the Commission's broadcast carriage rules since it first mandated cable carriage of broadcast signals in 1965. Indeed, the

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<sup>25</sup> See Congressional Research Service, *The Proposed Comcast-NBC Universal Combination: How It Might Affect the Video Market*, R41063 at 6-13 (released Feb. 2, 2010); *Executive Session With Diana Wilkin, CBS Wants Affils To Pony Up For Programs*, TVNewsCheck (Feb. 23, 2010) (networks demanding payments from affiliates because network programming "represents a substantial portion of the retransmission consent fees that stations and groups receive"); *SkyBOX: Citadel to DIRECTV Subs — Shove It!*, SkyREPORT (Mar. 29, 2010) (broadcast company demands double the retransmission consent fees it had received the previous year). See generally Media Bureau Seeks Comment On A Petition For Rulemaking To Amend The Commission's Rules Governing Retransmission Consent, 25 FCC Rcd 2731 (Med. Bur. 2010).

<sup>26</sup> See Buckeye Cablevision, Inc., *WUPW Application for Review*, CSR-7853-N; Buckeye Cablevision, Inc., *WTVG Application for Review*, CSR-7024-N; *KXAN, Inc.*, 25 FCC Rcd 3307 (Med. Bur. 2010).

Commission's first mandatory carriage rules were based on the predicted signal contours of nearby broadcast stations,<sup>27</sup> and the Commission at that time noted the anti-competitive impact of "blocking or impeding [a cable subscriber's] access to available off-the-air signals."<sup>28</sup> The Commission's current mandatory carriage rules similarly require that local commercial broadcasters provide a good quality signal to the cable operator's principal headend to be eligible for mandatory carriage<sup>29</sup> and define qualified local noncommercial television stations in part as those "[w]hose Grade B service contour encompasses the principal headend . . . of the cable system."<sup>30</sup>

In addition, the most important factor in the statutory and regulatory process by which communities may be added to or deleted from a station's market<sup>31</sup> is whether the station's signal can be received over the air in the relevant community. The Commission has held in the market modification context that "Grade B contour coverage . . . is an efficient tool to adjust market boundaries because it is a sound indicator of the economic reach of a particular television station's signal,"<sup>32</sup> and the courts have upheld the Commission's practice of placing greater emphasis on signal coverage in those cases.<sup>33</sup> Therefore, the adoption of a signal contour safeguard in the Non-Duplication rules would serve three important policy goals; it would (1) protect consumers; (2) harmonize the Commission's broadcast exclusivity standards; and (3) bring the Non-Duplication rules into alignment with the Commission's other broadcast carriage policies.

As a policy matter, moreover, the Commission's precedents demonstrate that allotment of a channel and its approval of a station's technical parameters in a broadcast license (*i.e.*, the station's

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<sup>27</sup> *First Report and Order in Docket Nos. 14895 and 15233*, 38 FCC at 716-19, paras. 85-92.

<sup>28</sup> *Id.* at 705, para. 57.

<sup>29</sup> 47 C.F.R. § 76.55(c)(3).

<sup>30</sup> 47 C.F.R. § 76.55(b)(2).

<sup>31</sup> *See* 47 U.S.C. § 534(h)(1)(C)(ii)(II); 47 C.F.R. § 76.59.

<sup>32</sup> Market Modifications and the New York Area of Dominant Influence Petitions for Reconsideration and Applications for Review of: Cablevision Systems Corporation, Time Warner, WRNN-TV Associates Ltd., Mountain Broadcasting Corporation, Trinity Broadcasting of New York, Inc., Paxson New York License, Inc., WLNY TV, Inc., *Memorandum Opinion And Order*, 12 FCC Red 12262, 12271 at para. 17 (1997), *aff'd sub nom. WLNY v. FCC*, 163 F.3d 137 (2d Cir. 1998).

<sup>33</sup> *WLNY v. FCC*, 163 F.3d at 141 (acknowledging that the Commission "placed greater emphasis on the second factor, that asks whether a station provides coverage or other local service to a community").



signal contour) should trump what essentially are viewer ratings (*i.e.*, significant viewing) that vary based on unrelated factors such as program popularity, at least within a station's signal coverage area. Under the Commission's policies, a station's signal contour traditionally has defined its market, and Commission policy consistently has protected and promoted continued service within that area.<sup>34</sup> In the digital context, the Noise Limited Service Contour ("NLSC") is the station's authorized service area and the area within which a station is entitled to protection from interference.<sup>35</sup> The Commission's Order implementing rules for Distributed Transmission Systems ("DTS") therefore allowed digital stations use of DTS to ensure service within their "traditional coverage area[s]."<sup>36</sup> The Commission also stated it would consider waiving its rules so stations could use DTS to serve their "former analog viewers," *i.e.*, those within the station's former analog Grade B contour, "*even if there is another affiliate of the same network that will serve [those viewers]*" after the DTV transition.<sup>37</sup> The Commission rejected a proposal to allot DTV channels in a manner that would maximize the service areas of all stations; instead, it determined that its primary goal should be to replicate existing service areas and thereby "ensure that broadcasters have the ability to reach the audiences that they now serve and that viewers will have access to the stations that they can now receive over-the-air."<sup>38</sup>

These fundamental Commission policies demonstrate that signal coverage is the appropriate primary measure of over-the-air competition in the Non-Duplication context just as it is in the

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<sup>34</sup> See, *e.g.*, 47 C.F.R. § 74.705(a) ("The TV broadcast station protected contour will be its Grade B contour signal level. . ."); An Inquiry into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System, *Report and Order*, 51 RR 2d 476 at para. 32-35 (1982) (adopting 74.705, noting "[w]e continue to believe that the Grade B contour offers the most realistic approximation of service received. . ."); see also *First Report and Order in Docket Nos. 14895 and 15233*, 38 FCC at 717-18 (requiring CATV systems to carry the signals of broadcast stations that place a Grade B signal over the system in most cases).

<sup>35</sup> Digital Television Distributed Transmission System Technologies, *Report and Order*, 23 FCC Rcd 16731 at para. 17, n. 68 (2008) ("*DTS Order*") ("[t]he Commission's rules generally define a DTV station's service area as the station's predicted noise-limited service contour") (footnote omitted, citing 47 C.F.R. § 73.622(e)); see also 47 C.F.R. § 74.706(a) ("[T]he DTV station protected service area is the geographic-area in which the field strength of the station's signal exceeds the noise-limited service levels specified in § 76.622(e) of this chapter.").

<sup>36</sup> *DTS Order* at para. 18.

<sup>37</sup> *Id.* at para. 28, n.114 (emphasis added).

<sup>38</sup> Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Sixth Report And Order*, 12 FCC Rcd 14588 at para. 30 (1997).

Syndex context. Absent a signal contour safeguard identical to that incorporated in the Syndex rules, however, the Non-Duplication rules have allowed regulatory interference to prevent cable reception of a station in areas where the Commission's policies instead are intended not only to protect the station from physical interference but to promote its continued availability throughout the area. The Commission should act now to support its policies, correct this unintended discrepancy, and thereby promote the public interest in the continued cable carriage of programming viewable over the air.

As far back as 1975, Block observed that "the [non-duplication] rules act to alter the existing competitive situation among broadcasters by increasing the local station's monopoly. In the absence of cable service, the 'local' station would be forced to compete with the significantly viewed signal. With cable, the local station is insulated from this competition [by the non-duplication rules]."<sup>39</sup> Recent developments in the marketplace highlight the continued relevance of Block's 1975 comments and warrant the Commission's action now to protect cable television subscribers from the unjustified loss of broadcast signals that can be viewed over the air.

### III. CONCLUSION

For the reasons stated above, the Commission should implement its long-standing proposal to incorporate a signal coverage safeguard in the Non-Duplication rules. Block has attached as Exhibit 1 the text of a rule that would implement the Commission's proposal.

Respectfully submitted,  
BLOCK COMMUNICATIONS, INC.

By: 

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July 1, 2010

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<sup>39</sup> See Amendment Of Subpart F Of Part 76 Of The Commission's Rules And Regulations With Respect To Network Program Exclusivity Protection By Cable Television Systems; Amendment Of Section 74.1103 Of The Commission's Rules And Regulations As It Relates To CATV Systems With Fewer Than 500 Subscribers, *First Report and Order*, 52 FCC 2d 519 at para. 39 (1975).

## CERTIFICATE OF SERVICE

I, Allan Block, hereby certify that on this 8<sup>th</sup> day of July 2010, I caused a copy of the foregoing Supplemental Comments of Block Communications, Inc. to be served by first-class mail, postage prepaid (except as otherwise indicated), to the following:

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A handwritten signature in black ink that reads "Allan Block" followed by a stylized flourish or initials.

Allan Block

\* hand delivery

## **Exhibit 1**

### **PROPOSED RULE**

§ 76.92(f): A community unit is not required to delete the duplicating network programming of any television broadcast station: (i) which is significantly viewed in the cable television community pursuant to §76.54; or (ii) when that cable community unit falls, in whole or in part, within the station's digital Noise Limited Service Contour.